WP(C) 6430/2006
BEFORE
THE HON'BLE MR JUSTICE RANJAN GOGOI
IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF
ASSAM, NAGALAND, MEGHALAYA, MANIPUR, TRIPURA MIZORAM AND ARUNACHAL PRADESH)

Writ Petition (Civil) No.6430 of 2006

Petitioner :
Dr. Malavika Barman,
D/o Dr. Dangshi Barman,
Resident of Sarvodaya Path,
ABC Bus stop,
Bhangagarh, Guwahati - 5,
District - Kamrup, Assam.

By Advocates :
Mr. P. K. Goswami, Sr. Advocate.
Mr. A. M. Bujorbarua,
Mr. D. C. Nath,
Miss. M. Barman, Advocates.

-versus-

Respondents:

1. The Assam Public Service Commission,
Represented by its Chairman,
Jawahar Nagar, Khanapara,
Guwahati - 22, Assam.

2. Deputy Secretary,
Assam Public Service Commission,
Jawahar Nagar, Khanapara,
Guwahati - 22.

3. The State of Assam,
Through the Commissioner and Secretary to the Government of Assam,
Health and Family Welfare (B) Department,
Dispur, Guwahati - 6.

4. The Secretary to the Government of Assam, Health and Family Welfare Depa
rtment, Dispur, Guwahati -6.

5. The Deputy Secretary to the Government of Assam, Health and Family Welfa
re Department, Dispur, Guwahati - 6.

6. The Director of Medical Education,
Assam, Housefed Complex,
Last Gate, Dispur, Guwahati -6.

By Advocate:
Mr. D. Saikia, Govt. Advocate, Assam.

B E F O R E

THE HON’BLE MR. JUSTICE RANJAN GOGOI.

Date of hearing : 18.01.2007.

Date of delivery of Judgment : 18.01.2007.

JUDGMENT & ORDER (oral)

1. Heard Mr. P. K. Goswami, learned Senior Counsel appearing for the petitioner and Mr. D. Saikia, learned Standing Counsel, Health Department.

2. The writ petitioner, Dr. Malavika Barman, has instituted the present proceeding seeking a direction from the Court for her appointment on the basis of her position in a select list dated 28.2.2006 and, alternatively, for interference of this Court with a subsequent advertisement dated 17.12.2006. The post for which the petitioner was selected is Demonstrator in Bio-Chemistry in the Medical Colleges of the State and the advertisement dated 17.12.2006, in respect of which interference has been prayed for, is for filling up four vacant posts of Demonstrator in Bio-Chemistry under Regulation 3(f) of the Assam Public Service Commission (Limitation of Functions) Regulations, 1951.

3. The facts, in a nutshell, may be noticed at the outset.

The petitioner claims that on the basis of a selection held in the year 2002 she was appointed under Regulation 3(f) of the A.P.S.C. Regulations in the post of Demonstrator in Bio-Chemistry in the Gauhati Medical College. This was on 28.2.2003. Her appointment, it is claimed, has been extended from time to time. On 8.4.2005 an advertisement was issued by the Assam Public Service Commission, inter alia, for four posts of Demonstrator in Bio-Chemistry. One post was earmarked for OBC candidate whereas the remaining three posts were to be filled up from general category candidates. The petitioner applied pursuant to the advertisement issued. 71 candidates, in all, were interviewed by the Public Service Commission on 26.8.2005. The select list published on 28.2.2006 included the name of the petitioner, an OBC candidate, at serial No.7. The petitioner was, however, not appointed. Thereafter, by the advertisement dated 17.12.2006 four more posts of Demonstrator in Bio-Chemistry were advertised for being filled up under Regulation 3(f). On an apprehension that the petitioner’s service under Regulation 3(f) is likely to be affected and contending that she has a right to be considered for appointment on the basis of her selection, the instant approach has been made seeking the reliefs earlier noticed.

4. The arguments advanced by Sri P. K. Goswami, learned Senior Counsel appearing for the writ petitioner has been three-fold. Referring to the averments made by the petitioner in her rejoinder affidavit Sri Goswami has argued that after the advertisement dated 8.4.2005 was published another vacancy in the post of Demonstrator in Bio-Chemistry occurred on 8.7.2005 due to the promotion of the concerned incumbent, one Dr. (Mrs.) Deepika Lahan, to a post of Assistant Professor. The selection/interview was held by the Assam Public Service Commission on 26.8.2005. According to Sri Goswami, when the advertisement was published on 8.4.2005, the posts advertised should have included such posts which could have been reasonably anticipated to fall vacant, at least, within the calendar year of 2005. The said advertisement, however, did not include the post which fell vacant on 8.7.2005 though the said vacancy could have been reasonably anticipated at that point of time. According to Sri Goswami, the said post should now, therefore, be taken into account and embraced by the selection held pursuant to the advertisement dated 8.4.2005. Relying on a decision of the Apex Court in the case of Sandeep Singh vs. State of Haryana and another, reported in (2002) 10 SCC 549, S

ri Goswami has submitted that in accordance with the law laid down by the Apex C ourt, the post which had fallen vacant on 8.7.2005 has to be covered by the sele ction process in question. Arguing further, Sri Goswami has pointed out that in a similar situation and in respect of a similar vacancy that had occurred in the ENT Department, the stand of the Govt. of Assam, as reflected in its letter dat ed 28.12.2005, had been that the said vacancy should be taken note of by the Pub lic Service Commission while making its recommendations. The said view of the St ate Government was accepted by the Commission and, accordingly, though the posts advertised in the ENT department were initially three, the recommendations were made for four posts. Sri Goswami has, therefore, argued that a similar stand sh ould have been taken by the Government in respect of the vacancy in Bio Chemistr y that had occurred on 8.7.2005. If that be so, Sri Goswami, learned counsel for the petitioner, has pointed out, that taking into account the posts earmarked f or general category candidates and reserved category candidates, the petitioner whose name is at Serial No.7 of the select list would be entitled to be appointe d by virtue of being a OBC candidate. Sri Goswami has also contended that anothe r post of Demonstrator in Bio-Chemistry was created on 29.3.2006 and two other p osts of Demonstrator fell vacant on 21.7.2006 due to promotions made. All the af oresaid three posts, according to Sri Goswami, should be covered by the selectio n process pursuant to the advertisement dated 8.4.2005 as all such vacancies cou ld have been reasonably anticipated at the time when the advertisement dated 8.4 .2005 was issued.

5. In addition to the aforesaid argument, which appears to be the main plan k of the petitioner’s case, learned counsel for the petitioner has argued that e ven assuming that the additional posts can be legitimately filled up by the fres h advertisement dated 17.12.2006, as has been sought to be done in the present c ase, as appointments in terms of the fresh advertisement dated 17.12.2006 are co ntemplated to be under Regulation 3(f), the State instead of going for a fresh a dvertisement and selection should have acted on the basis of a select list alrea dy available and was prepared in the same calendar year i.e. on 28.2.2006. Learn ed counsel for the petitioner has further argued that the selection process init iated by the advertisement dated 17.12.2006 having contemplated filling up of th e advertised posts under Regulation 3(f), the proposed action would amount to re placement of an existing 3(f) employee like the petitioner by another 3(f) emplo yee. Appointments under Regulation 3(f) being ad hoc in nature, Sri Goswami has contended that the same would amount to replacement of one ad hoc employee by an other which is not permissible under the law.

6. The arguments advanced by Sri Goswami, learned counsel for the petitione r, have met with stiff resistance offered by Sri D. Saikia, learned departmental counsel. Sri Saikia has contended that on the date of the advertisement i.e. 8. 4.2005, only four vacancies were existing and therefore the said vacancies were advertised. Vacancies that have occurred subsequently, according to Sri Saikia, cannot be filled up by the same selection process and therefore such vacancies h ave been re-advertised on 17.12.2006. In this regard, Sri Saikia has placed reli ance on two decisions of the Apex Court i.e. in the case of Sanjoy Bhattacharjee vs. Union of India and others, reported in (1997) 4 SCC 283 and in the case of Gujarat State Dy. Executive Engineer’s Association vs State of Gujarat and other s, reported in 1994 Supple (2) SCC 591. The vacancy that had occurred on 8.7.200 5 as well as the subsequent vacancies, therefore, cannot be filled up on the bas is of the select list dated 28.2.2006. Sri Saikia, learned counsel for the respo ndents, has submitted that on account of certain pressing need and the exigencie s of service resort to recruitment under Regulation 3(f) has been made in the pr esent case for which the impugned advertisement dated 17.12.2006 has been issued . Arguing further, Sri Saikia has submitted that under the provisions of the Ass am Fiscal Responsibility and Budget Management Act, 2005, which had come into fo rce in the meantime, a select list must be equal in number to the posts advertis ed and therefore by operation of the aforesaid statute the select list has to be limited to four persons. Beyond the said number, the select list will have no b

inding effect. Sri Saikia has also pointed out that following the provisions of the aforesaid Act, the select list dated 28.2.2006 has been pruned to four number of candidates by a modification dated 27.7.2006. As the petitioner's name is at serial No.7 of the select list dated 28.2.2006 and her name does not appear in the modified select list dated 27.7.2006, the petitioner, according to Sri Saikia, is not entitled to be appointed.

7. The arguments advanced by the learned counsels for the parties have received the due and anxious consideration of the Court. The first and primary question that will require an answer from the Court in the present case is the extent of vacancies that has to be taken into account while issuing an advertisement for recruitment. The answer to the above question that will be provided by the Court must, naturally, be understood to be subject to the power of the State to advertise such vacancies only as are required to be filled up in the exigencies of the administrative process.
Ordinarily and in the normal course all existing vacancies, if required to be filled up, must be covered by the advertisement issued. Vacancies that can reasonably be anticipated to arise in the immediate future must also be taken into account. This is on the principle that a selection process which is normally time-consuming and involves a tardy procedure cannot be expected to be repeated on several occasions within a calendar year. The service Rules in force normally take care of the above situation by requiring the appointing authority to take into account the existing and anticipated vacancies likely to arise within or in the next calendar year, as may be, and to initiate the process of appointment/promotion well in time. In the present case, however, there are no statutory Rules in force as preparation of such Rules have not gone beyond the draft stage. In the above situation, it is the Court which must draw the line i.e. demarcate the time upto which vacancies likely to occur, should be covered by an advertisement for filling up the posts in the service. More specifically, in the present case, the Court will have to identify the posts that should have been included in the advertisement dated 8.4.2005.

8. The rationale and logic behind the principle engrafted in the service Rules requiring the appointing authority to advertise the existing as well as anticipated vacancies are not far to seek. If a post, with reasonable certainty, is likely to arise and such post is required to be filled up in the exigencies of service, there is no reason as to why the advertisement issued should not take care of such a vacancy. What, however, must be emphasized, at this stage, is the proximity between the initiation of the selection process by issuing an advertisement and the likelihood of the vacancy occurring. The proximity, naturally, will have to be close and not remote. Taking into account the vacancies which are certain to occur in the immediate proximity of time is a course of action in the interest of the administrative process which normally requires all posts in a cadre to be continuously manned. The aforesaid principle also dispenses with the requirement of holding repeated selections besides ensuring maximum opportunities to those seeking public employment. If the above could be the principle underlying the specific requirement in the service Rules with regard to filling up of anticipated vacancies, there is no reason why the said principle, wholesome as it is, should not be understood by the Court to be also a requirement in a situation where recruitment is made in the absence of any service Rules. In the present case the advertisement was issued on 8.4.2005; one post of Demonstrator in Bio-Chemistry fell vacant on 8.7.2005; the interviews were held on 26.8.2005. The promotion process giving rise to the vacancy that had eventually occurred on 8.7.2005, according to the petitioner, was initiated around the time when the advertisement was issued though no specific date has been spelt out. The above position is not disputed by the State. The State has also not disputed that in a similar situation a subsequent vacancy in the post of Registrar in ENT Department was requisitioned by the State for being covered by the same selection process pursuant to the very same advertisement dated 8.4.2005 and that the said 'request' of the State Govt. was accepted by the Public Service Commission. If that be so, the

re is no reason why the Court should not hold that when the respondents had issued the advertisement on 8.4.2005 the vacancy in the post of Demonstrator, Bio-Chemistry which had occurred on 8.7.2005 should have been taken into account and, in any case, the said vacancy should have been covered by the selection process culminating in the select list dated 28.2.2006. In this regard, the following observation of the Apex Court in Sandeep Singh (supra) may be reiterated.

> That apart, even on first principle, it appeals to us to commend that the vacancies available in any particular service till the date of interview at least should be filled up from the very same examination unless there is any statutory embargo for the same.

9. As the above view of the Court will be sufficient to take care of the grievances of the petitioner, the Court does not consider it necessary to embark upon an examination of the question as to whether the other three vacancies that had occurred on 29.3.2006 and 21.7.2006, respectively, should have been covered by the same selection process. The decisions relied on by Sri Saikia, learned counsel for the respondents, in Sanjoy Bhattacharjee (supra) and Gujarat State Dy. Executive Engineer's Association (supra) may require scrutiny in the context of its application to the said vacancies but certainly not to the vacancy that had occurred on 8.7.2005. On the same reasoning the other arguments advanced by the learned counsel for the petitioner, as noticed above, need not detain the Court. The Court is of the view that its answer to the said questions raised by the petitioner must await a more appropriate situation to justify a record of the views of the Court on the said questions.

10. Contentions have also been advanced by the learned counsel for the petitioner to show that the petitioner will have a right to be appointed against the additional vacancy that had occurred on 8.7.2005 by virtue of her position in the select list dated 28.2.2006. The principles of law having been laid down and the views of the Court with regard to the vacancy in question having been expressed, the Court is of the opinion that it is the respondents who should now and forthwith work out the entitlement of the petitioner to the said vacancy on the basis of the select list dated 28.2.2006 or on the basis of such further alterations in the modified select list dated 27.7.2006. The advertisement dated 17.12.2006 may be given effect to by the respondents subject to the above directions.

11. The writ petition, consequently, is allowed in terms of the above directions.

JUDGE

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